

Civil Action #6:06-CV-00109 BIDZIRK vs. SMITH

Philip J. Smith makes the following known to the appellate court

Filed this day in response to Bidzirk, Daniel "Ty" Schmidt, Kevin Elwell

(see attached countersuit claims)

1. Clarification for appellate court will be provided, however, Philip J. Smith (ProSe) feels countersuit adequately defends appeal; therefore a stay on the judgment should be rendered.
2. The JackWhispers.com website is maintained as a consumer advocacy website and is non-profit in nature. It is not a commercial or money-making venture. The assertion that the JackWhispers.com website is a commercial venture is impertinent and irrelevant to this case and related discussion. Furthermore, the JackWhispers.com website is not a competing venture to any Bidzirk property (website, storefront, eBay ID/seller). The majority of items that are placed as affiliate links on the JackWhispers.com website cannot possibly be viewed as inventory that Bidzirk would either consign or sell. Bidzirk only accepts items that reach a \$50.00 minimum in assumed value. As an example, one affiliate (on Jackwhispers) is for Jones Soda, a product that typically falls into the price category of under \$2.00 and is not an eBay consignable item that Bidzirk would accept.
3. Daniel "Ty" Schmidt and Jill Patterson's ownership of Bidzirk, their marriage, and their likeness are all matters of public domain as well as matters of public taxpayer and license record. As a matter of fact, Schmidt and Patterson promote the ownership of Bidzirk with their marriage regularly in public news forums and websites.
4. Fair use in the Lanham Act (for clarifying copyright law) specifically grants news and news commentary of **all forms** to have fair use of trademarks unless specifically meant as a campaign to defame a *competitor*. JackWhispers.com is not a competitor to Bidzirk.com.
5. Article in question was meant solely for the purpose of education of the JackWhispers.com reading base. Multiple stories have been done on eBay and eBay related topics in the past and have continued to be published after article in question.

I pray the court will find the injunction ruling as ordered by William H. Catoe to stand and that all frivolous claims being made by Bidzirk be dismissed and instead judgment without trial be issued in Philip J. Smith's favor as asserted in countersuit.